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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 HUGH A. SANDERS,

11 Plaintiff,

12 v.

13 CAROLYN W. COLVIN, Acting
14 Commissioner of the Social Security
Administration,

15 Defendant.
16

CASE NO. 12-cv-06068 BHS

REPORT AND
RECOMMENDATION ON
PLAINTIFF'S COMPLAINT

Noting Date: February 7, 2014

17 This matter has been referred to United States Magistrate Judge J. Richard
18 Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR
19 4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261,
20 271-72 (1976) (ECF No. 6). This matter has been fully briefed (*see* ECF Nos. 19, 21,
21 24).

22 After considering and reviewing the record, the Court finds that the ALJ failed to
23 evaluate properly the medical evidence provided by plaintiff's examining psychologist.
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1 The ALJ provided his own interpretation of the medical evidence, and failed to explain
2 adequately why his interpretation of the psychologist's examination results were more
3 correct than the opinions of the psychologist who performed the examination. Similarly,
4 the other reasons provided by the ALJ for his failure to credit fully the psychologist's
5 opinion also were not based on substantial evidence in the record.

6 Therefore, this matter should be reversed and remanded for further consideration
7 pursuant to sentence four of 42 U.S.C. § 405(g).
8

9 BACKGROUND

10 Plaintiff, HUGH ANDREW SANDERS, was born in 1968 and was 41 years old
11 on the amended alleged date of disability onset of June 1, 2009 (*see* Tr. 48, 173). Plaintiff
12 obtained his GED at age 15 while in a group home (Tr. 50) and has taken some college
13 courses (Tr. 51). Plaintiff has past relevant work as a cook helper (*see* Tr. 34).

14 Plaintiff has at least the severe impairments of "obesity; hernia; substance abuse;
15 antisocial personality disorder; [and] psychosis NOS, r/o mood disorder NOS (20 CFR
16 404.1520(c) and 416.920(c))" (Tr. 27).

17 At the time of the hearing, plaintiff was staying with his mother, but often travels
18 by bus or gets rides to stay with friends (Tr. 51-52, 56-57).
19

20 PROCEDURAL HISTORY

21 Plaintiff filed an application for disability insurance ("DIB") benefits pursuant to
22 42 U.S.C. § 423 (Title II) and Supplemental Security Income ("SSI") benefits pursuant to
23 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act (*see* Tr. 172-89). The
24 applications were denied initially and following reconsideration (Tr. 84-101). Plaintiff's

1 requested hearing was held before Administrative Law Judge Larry Kennedy (“the ALJ”)
2 on August 16, 2011 (*see* Tr. 42-83). On October 21, 2011, the ALJ issued a written
3 decision in which the ALJ concluded that plaintiff was not disabled pursuant to the Social
4 Security Act (*see* Tr. 22-41).

5 On November 30, 2012, the Appeals Council denied plaintiff’s request for review,
6 making the written decision by the ALJ the final agency decision subject to judicial
7 review (Tr. 1-7). *See* 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court
8 seeking judicial review of the ALJ’s written decision in December, 2012 (*see* ECF Nos.
9 1, 3). Defendant filed the sealed administrative record regarding this matter (“Tr.”) on
10 March 4, 2013 (*see* ECF Nos. 11, 12).
11

12 The issues presented by plaintiff include:

- 13 (1) Did the administrative law judge (ALJ) properly consider
14 plaintiff’s substance abuse in finding him not disabled?
- 15 (2) Did the ALJ properly evaluate the medical evidence of record?
- 16 (3) Did the ALJ properly find that Plaintiff’s allegations regarding
17 his symptoms and limitations were not entirely credible,
18 especially when consideration is give to the new evidence?
- 19 (4) Did any of the alleged errors result in a failure by the ALJ to
20 determine properly plaintiff’s residual functional capacity and
21 formulate an accurate vocational hypothetical question?

22 (*See* ECF No. 19).

23 STANDARD OF REVIEW

24 Plaintiff bears the burden of proving disability within the meaning of the Social
Security Act (hereinafter “the Act”); although the burden shifts to the Commissioner on
the fifth and final step of the sequential disability evaluation process. *See Bowen v.*

1 | *Yuckert*, 482 U.S. 137, 140, 146 n. 5 (1987). The Act defines disability as the “inability to
2 | engage in any substantial gainful activity” due to a physical or mental impairment “which
3 | can be expected to result in death or which has lasted, or can be expected to last for a
4 | continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A),
5 | 1382c(a)(3)(A). A claimant is disabled pursuant to the Act only if claimant’s
6 | impairment(s) are of such severity that claimant is unable to do previous work, and
7 | cannot, considering the claimant’s age, education, and work experience, engage in any
8 | other substantial gainful activity existing in the national economy. 42 U.S.C. §§
9 | 423(d)(2)(A), 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir.
10 | 1999).

12 | Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's
13 | denial of social security benefits if the ALJ's findings are based on legal error or not
14 | supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d
15 | 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
16 | 1999)). “Substantial evidence” is more than a scintilla, less than a preponderance, and is
17 | such ““relevant evidence as a reasonable mind might accept as adequate to support a
18 | conclusion.”” *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (*quoting Davis v.*
19 | *Heckler*, 868 F.2d 323, 325-26 (9th Cir. 1989)). Regarding the question of whether or not
20 | substantial evidence supports the findings by the ALJ, the Court should “review the
21 | administrative record as a whole, weighing both the evidence that supports and that
22 | which detracts from the ALJ’s conclusion.”” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
23 | Cir. 1995) (*citing Magallanes, supra*, 881 F.2d at 750).

1 In addition, the Court must independently determine whether or not “the
2 Commissioner’s decision is (1) free of legal error and (2) is supported by substantial
3 evidence.”” *See Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2006) (*citing Moore v.*
4 *Comm’r of the Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002) (collecting cases));
5 *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996) (*citing Stone v. Heckler*, 761 F.2d
6 530, 532 (9th Cir. 1985)). According to the Ninth Circuit, “[l]ong-standing principles of
7 administrative law require us to review the ALJ’s decision based on the reasoning and
8 actual findings offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit
9 what the adjudicator may have been thinking.” *Bray v. Comm’r of SSA*, 554 F.3d 1219,
10 1225-26 (9th Cir. 2009) (*citing SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other
11 citation omitted)); *see also Molina v. Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) (“we
12 may not uphold an agency’s decision on a ground not actually relied on by the agency”) (*citing Chenery Corp*, *supra*, 332 U.S. at 196). In the context of social security appeals,
13 legal errors committed by the ALJ may be considered harmless where the error is
14 irrelevant to the ultimate disability conclusion when considering the record as a whole.
15 *Molina, supra*, 674 F.3d at 1117-1122; *see also* 28 U.S.C. § 2111; *Shinsheki v. Sanders*,
16 556 U.S. 396, 407 (2009).

17 DISCUSSION

20 1. **Did the ALJ properly evaluate the medical evidence of record?**

21 Among other things, plaintiff contends that the ALJ failed to evaluate properly the
22 medical evidence and the opinion of examining psychologist Dr. Tasmyn Bowes, Psy. D.
23 (*see* Opening Brief, ECF No. 19, pp. 11-14). Defense argues that all of the reasons
24

1 provided by the ALJ to discredit Dr. Bowes' opinion were proper and that the "ALJ
2 properly evaluated Dr. Bowes's opinion" (*see* Response Brief, ECF No. 21, p. 20; *see*
3 *also*, pp. 18-20).

4 Even if an examining psychologist's opinion is contradicted, that opinion can be
5 rejected only "for specific and legitimate reasons that are supported by substantial
6 evidence in the record." *Lester v. Chater*, 81 F.3d 821, 830-31 (9th Cir. 1996) (*citing*
7 *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d
8 499, 502 (9th Cir. 1983)). Although an ALJ may accomplish this by "setting out a
9 detailed and thorough summary of the facts and conflicting clinical evidence, stating his
10 interpretation thereof, and making findings," the ALJ must explain adequately why his
11 own interpretations, rather than those of the doctor, are correct. *See Reddick v. Chater*,
12 157 F.3d 715, 725 (9th Cir. 1998) (*citing Magallanes v. Bowen*, 881 F.2d 747, 751 (9th
13 Cir. 1989); *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)).

14
15 a. Dr. Tasmyn Bowes, Psy.D., examining psychologist

16 Dr. Bowes examined and evaluated plaintiff on January 4, 2010 at the request of
17 the Department of Social and Health Services (*see* Tr. 340). She also reviewed the
18 psychological evaluation completed by Dr. Dan Neims, Ph.D. dated May 15, 2009, and
19 took a detailed history from plaintiff (*see* Tr. 341-43). For example, she noted that
20 plaintiff's chief complaint was: "I can't hold a job – I've smacked around my last few
21 employers –Knocked my last boss off a ladder – I get really angry – screaming and
22 hollering especially with authority" (Tr. 341). Dr. Bowes noted plaintiff's description of
23 his manic episodes, where he 'will play [his] guitar for 24 hours straight with no breaks"
24

1 (*id.*). Although most of the time, according to plaintiff, he had too much energy, when he
2 gets depressed, he described “that’s when I go to my moms’ and she takes care of me”
3 (*id.*).

4 Dr. Bowes included a detailed assessment of plaintiff’s history with alcohol and
5 other substances (*see* Tr. 342). For example, she noted his early history with
6 hallucinogens; and the fact that since then, plaintiff “has used methamphetamine on and
7 off” (Tr. 342). She noted that he “described his most significant use of methamphetamine
8 as occurring for a few days at a time in 1998, 2007, and December of 2009” (Tr. 342). As
9 Dr. Bowes evaluated plaintiff on January 4, 2010, she was well aware of the fact that
10 plaintiff was using significant amounts of methamphetamine within a month of her
11 evaluation (*see id.*). She also noted plaintiff’s “long history of using marijuana a few
12 times a week,” and that he “described drinking alcohol 2-3 times a week, ‘Just so that
13 [he] c[ould] sleep” (*id.*). Dr. Bowes even noted plaintiff’s ““three cigarettes a day”” and
14 his approximate ““three cups of coffee most days”” (*id.*).

16 The Court notes that the ALJ appears not to have read this aspect of Dr. Bowes’
17 opinion because the ALJ failed to credit fully Dr. Bowes opinion in part with a finding
18 that Dr. Bowes “failed to consider the claimant’s substance abuse in her function
19 statement” (Tr. 33 (*citing* Tr. 344-46)). However, in addition to the detailed description
20 of plaintiff’s history with substances, as already described, Dr. Bowes, on one of the
21 pages relied on by the ALJ for his finding that Dr. Bowes failed to consider substance
22 abuse, indicated her diagnoses of Alcohol Abuse; Methamphetamine Abuse; and
23 Cannabis Abuse (*see* Tr. 345).

1 Also, when Dr. Bowes discussed plaintiff's functional limitations, they were
2 prefaced with the statement that he "appears to suffer from Bipolar 1 Disorder" (Tr. 345).
3 She then goes on to discuss the functional limitations this has on his ability to function
4 and hold on to a job (*id.*). Her prognosis ends with her indication that he was encouraged
5 to seek out treatment for his "severe level of Bipolar disorder he has struggled with over
6 the course of his adult life, [as] Without treatment [plaintiff] is at risk of engaging in
7 behavior that puts his own well being and the well being of the people around him in
8 jeopardy" (Tr. 346). The only logical conclusion to be drawn from her report is that she is
9 attributing these functional limitations to plaintiff's Bipolar 1 Disorder, as opposed to his
10 substance abuse problems (*see id.*). Therefore, the ALJ's finding that Dr. Bowes "failed
11 to consider the claimant's substance abuse in her function statement" is a finding without
12 substantial support in the record (Tr. 33 (*citing* Tr. 344-46)). This finding by the ALJ
13 provides no support for the ALJ's failure to credit fully the opinion of Dr. Bowes.

15 Although defendant argues that Dr. Bowes' opinion was discredited properly by
16 the ALJ because "Dr. Bowes' opinion about Plaintiff's ability to function did not identify
17 whether a limitation she assessed was the result of bipolar disorder, substance abuse, or
18 both" (Response, ECF No. 21, p. 19), this argument is curious given defendant's earlier
19 argument that the "materiality of DAA [drug addiction and/or alcoholism] [] only
20 becomes an issue if there is an initial finding that Plaintiff is disabled considering all of
21 his impairments, including those caused by DAA" (*see id.*, p. 4). As the ALJ never made
22 a finding that plaintiff is disabled considering all of his impairments, whether or not Dr.
23 Bowes differentiated her assessments of functional limitations on the basis of drug
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1 addiction and/or alcoholism is not a proper basis to discredit her opinion at that stage of
2 the sequential disability evaluation.

3 When discussing plaintiff's activities of daily living ["ADLS"], Dr. Bowes noted
4 that plaintiff had not "had 'a place of [his] own'" and "was unable to provide very much
5 information regarding his ability to do house hold chores and follow through with
6 ADLS" (Tr. 344). She opined that plaintiff "is likely able to perform these tasks but
7 would likely find it difficult to organize and plan and would likely get things done in a
8 scattered disorganized fashion due to difficulty concentrating" (*id.*).
9

10 When conducting her mental status examination, ("MSE"), Dr. Bowes noted that
11 plaintiff "maintained somewhat fleeting eye contact" and "demonstrated no signs of
12 being under the influence of alcohol or other substances" (*id.*). She also noted that
13 plaintiff "talked fast and long," and that his speech was well maintained [] but not well
14 organized" (*id.*). She observed that plaintiff "easily veered from the topic and had to be
15 redirected to the question that had been posed to him" (*id.*). Dr. Bowes observed that
16 plaintiff's affect was labile; his motor activity was agitated; he was fidgety; and he had
17 difficulty sitting in his chair throughout the interview.

18 Regarding plaintiff's cognitive testing, Dr. Bowes assessed that his long-term
19 memory was "within adequate range," while his fund of knowledge and his ability to
20 abstract were in the average range (*id.*). She also opined that his ability for arithmetic
21 calculation was in the "moderate-complex task range" (*id.*).
22

23 In addition to the substance/alcohol-related diagnoses discussed already, Dr.
24 Bowes also diagnosed plaintiff with "Bipolar I Disorder. Most recent episode manic,

1 severe with psychotic features,” and a rule-out diagnosis of Antisocial Personality
2 Disorder (Tr. 345). Dr. Bowes indicated her ultimate discussion/medical source statement
3 as follows:

4 In a work setting, Mr. Sanders is likely to become significantly
5 overwhelmed and anxious by the demands and expectations that he
6 function efficiently and with sufficient speed. His speed of acquisition
7 of information from memory and use of that information to guide task
8 completion is likely to be severely impaired. He is likely to be at risk
9 of lashing out in verbally/physically aggressive acts in response to the
10 level of general irritability/agitation that he experiences. Mr. Sanders'
11 mental ability to relate to others, including fellow workers and
12 supervisors, is likely severely limited. His ability to understand,
13 remember, and follow instructions is likely unreliable. He appears to
14 have a higher than average IQ but is prone to engaging in impulsive
15 behavior/decision making that impacts his ability to function and
16 has caused great harm in his life and the lives of others.

17 He demonstrated no comprehension or significant memory
18 difficulties during the psychological evaluation. Mr. Sanders'
19 mental ability to withstand the pressures and stress associated with
20 day-to-day work activity appears in significantly limited at this time
21 from a mental health perspective.

22 (Tr. 345-46).

23 As already discussed, the ALJ failed to credit Dr. Bowes opinion in part due to the
24 ALJ’s erroneous finding that she had not considered plaintiff’s “substance abuse in her
25 function statement” (*see* Tr. 33; *see also, supra*). He also failed to credit her opinion fully
26 because he found that her conclusion that plaintiff’s ability to follow instructions is
27 “likely unreliable” was “somewhat vague” (*see* Tr. 33). However, Dr. Bowes’ opinion
28 that plaintiff’s ability to “follow instructions is likely unreliable” is not vague at all, but
29 indicates that, more likely than not, plaintiff’s ability to follow instructions is unreliable
30 (*see* Tr. 345-46). The ALJ’s finding that Dr. Bowes’ opinion was vague is not supported

1 by substantial evidence in the record, and his failure to credit her opinion on this basis
2 does not constitute a specific and legitimate reason to fail to credit fully her opinions.

3 Finally, the ALJ provides his last reason for failing to credit fully Dr. Bowes'
4 opinions: the ALJ found that "Dr. Bowes' opinion is not entirely consistent with her
5 findings" (Tr. 33). In support of this finding, the ALJ lists some of plaintiff's intact
6 cognitive results (*see id.*). However, it is clear that Dr. Bowes did not assess plaintiff
7 with functional limitations due to his intellectual ability: She opined that he had "a higher
8 than average IQ but is prone to engaging in impulsive behavior/decision making
9 that impacts his ability to function and has caused great harm in his life and the lives
10 of others" (Tr. 346). Therefore, the ALJ's recitation of facts demonstrating that
11 plaintiff could perform mathematical problems, serial sevens, and "demonstrated no
12 comprehension or significant memory difficulties during the evaluation" does not
13 constitute a legitimate basis to discount Dr. Bowes' opinion that despite his high
14 IQ, plaintiff suffered from impulsive behavior and decision making that would
15 impact his ability to function in a work environment (*see id.*).

17 In addition, the ALJ notes that plaintiff had "well-maintained speech," but
18 without explanation left out the second half of that observation (*see* Tr. 33). The
19 ALJ's finding that plaintiff had "well-maintained speech" is misleading, given that
20 Dr. Bowes' observation actually was: "Speech was well maintained [] but not well
21 organized" (Tr. 344). The ALJ did not explain why he found it to be relevant that
22 plaintiff's speech was well maintained, but found it not worth mentioning the
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1 limitation Dr. Bowes observed about plaintiff's well maintained speech in that it
2 was not well organized.

3 Based on the relevant record, the Court concludes that the ALJ's finding that
4 Dr. Bowes' opinion was not consistent is not supported by substantial evidence in
5 the record as a whole.

6 Defendant, in defense of the ALJ's finding of an inconsistency, argues that "Dr.
7 Bowes found that Plaintiff was cooperative, his affect was labile, and his speech was
8 well-maintained, but she nevertheless assessed severe social limitations due to Plaintiff's
9 'impulsive behavior/decision making' and 'general irritability/agitation'" (Response,
10 ECF No. 21, p. 18-19 (*citing* Tr. 33, 344-46)). First, the Court notes that an examining
11 psychologist is best in a position to assess clinical observations about a claimant's affect
12 and behavior, and to determine the likely results, clinically, of the observations, having
13 years of education and training in such endeavors: "Experienced clinicians attend to
14 detail and subtlety in behavior, such as the affect accompanying thought or ideas, the
15 significance of gesture or mannerism, and the unspoken message of conversation. The
16 Mental Status Examination allows the organization, completion and communication of
17 these observations." Paula T. Trzepacz and Robert W. Baker, *The Psychiatric Mental*
18 *Status Examination 3* (Oxford University Press 1993). A mental health professional is
19 trained to observe patients for signs of their mental health not rendered obvious by the
20 patient's subjective reports, in part because the patient's self-reported history is "biased
21 by their understanding, experiences, intellect and personality" (*id.* at 4), and, in part,
22 because it is not uncommon for a person suffering from a mental illness to be unaware
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1 that her “condition reflects a potentially serious mental illness.” *Van Nguyen v. Chater*,
2 100 F.3d 1462, 1465 (9th Cir. 1996) (citation omitted).

3 Second, regarding defendant’s defense of the ALJ’s finding of an inconsistency,
4 defendant appears to imply that a labile affect is a normal psychological result (Response,
5 ECF No. 21, p. 18-19 (*citing* Tr. 33, 344-46)). *See also, e.g.*, Andrew Merwook, M. Sc,
6 Wai Chen, MRC Psych, Ph.D., Fruhling Rijskijk, Ph.D, et al., Genetic Associations
7 Between the Symptoms of Attention-Deficit/Hyperactivity Disorder and Emotional
8 Lability in Child and Adolescent Twins, J. Amer. Acad. Child & Adolescent Psychiatry,
9 published online November 27, 2013, Abstract available at
10 [http://www.jaacap.com/article/S0890-8567\(13\)00815-0/abstract](http://www.jaacap.com/article/S0890-8567(13)00815-0/abstract), last visited January 11,
11 2014 (“Emotional lability is recognized as an associated feature of attention-
12 deficit/hyperactivity disorder (ADHD)”). Defendant, like the ALJ, provides a different
13 interpretation of the objective medical evidence than does the examining psychologist
14 who is trained to observe such things as a labile affect; who is trained to identify this
15 particular objective observation as potentially indicative of mental illness; and, who is
16 trained to incorporate such observations into an assessment.

17
18 When an ALJ seeks to discredit a medical opinion, he must explain why his own
19 interpretations, rather than those of the doctors, are correct. *Reddick, supra*, 157 F.3d at
20 725 (*citing Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)); *see also*
21 *Blankenship v. Bowen*, 874 F.2d 1116, 1121 (6th Cir. 1989) (“When mental illness is the
22 basis of a disability claim, clinical and laboratory data may consist of the diagnosis and
23 observations of professional trained in the field of psychopathology. The report of a
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1 psychiatrist should not be rejected simply because of the relative imprecision of the
2 psychiatric methodology or the absence of substantial documentation”) (*quoting Poulin v.*
3 *Bowen*, 817 F.2d 865, 873-74 (D.C. Cir. 1987) (*quoting Lebus v. Harris*, 526 F.Supp. 56,
4 60 (N.D. Cal. 1981))); *Schmidt v. Sullivan*, 914 F.2d 117, 118 (7th Cir. 1990) (“judges,
5 including administrative law judges of the Social Security Administration, must be
6 careful not to succumb to the temptation to play doctor. The medical expertise of the
7 Social Security Administration is reflected in regulations; it is not the birthright of the
8 lawyers who apply them. Common sense can mislead; lay intuitions about medical
9 phenomena are often wrong”) (internal citations omitted)).

11 Simply misinterpreting, or reinterpreting, the objective medical evidence with a
12 finding of an inconsistency, when one does not exist, is not a proper basis for an ALJ to
13 reject the opinion of an examining doctor. *See Nguyen v. Chatter*, 100 F.3d 1462, 1465
14 (9th Cir. 1996). Here, the ALJ provided an alternative explanation for the objective
15 medical evidence over the opinion of the trained psychologist; however, he did not
16 adequately explain why his reasons were more correct than the assessment of the trained
17 psychologist.

18 For the reasons stated and based on the relevant record, the Court concludes that
19 the ALJ’s findings with respect to the opinion of Dr. Bowes are not supported by
20 substantial evidence in the record as a whole, and also concludes that the ALJ failed to
21 provide specific and legitimate reasons for failing to credit fully her opinions.

22 Also, the Court concludes that this error is not harmless error.
23
24

1 The Ninth Circuit has “recognized that harmless error principles apply in the
2 Social Security Act context.” *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
3 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
4 Cir. 2006) (collecting cases)). The Court noted multiple instances of the application of
5 these principles. *Id.* (collecting cases). The court noted that “several of our cases have
6 held that an ALJ’s error was harmless where the ALJ provided one or more invalid
7 reasons for disbelieving a claimant’s testimony, but also provided valid reasons that were
8 supported by the record.” *Id.* (citations omitted). The Ninth Circuit noted that “in each
9 case we look at the record as a whole to determine [if] the error alters the outcome of the
10 case.” *Id.* The court also noted that the Ninth Circuit has “adhered to the general principle
11 that an ALJ’s error is harmless where it is ‘inconsequential to the ultimate nondisability
12 determination.’” *Id.* (quoting *Carmickle v. Comm’r Soc. Sec. Admin.*, 533 F.3d 1155,
13 1162 (9th Cir. 2008)) (other citations omitted). The court noted the necessity to follow
14 the rule that courts must review cases “‘without regard to errors’ that do not affect the
15 parties’ ‘substantial rights.’” *Id.* at 1118 (quoting *Shinsheki v. Sanders*, 556 U.S. 396, 407
16 (2009) (quoting 28 U.S.C. § 2111) (codification of the harmless error rule)).

17
18 Dr. Bowes opined that plaintiff likely suffered from severe impairment in his
19 “speed of acquisition of information from memory and use of that information to guide
20 task completion;” severe limitation in his “mental ability to relate to others, including
21 fellow workers and supervisors;” an unreliable ability to “understand, remember, and
22 follow instructions;” was “at risk of lashing out in verbally/physically aggressive acts
23 in response to the level of general irritability/agitation that he experiences;” and was
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1 “prone to engaging in impulsive behavior/decision making that impacts his ability
2 to function” (*see* Tr. 345-46). Had the ALJ credited fully these opinions, the
3 functional determination regarding plaintiff’s residual functional capacity would
4 have been more restrictive, and would hence have affected the ultimate
5 determination regarding the disability status of plaintiff.

6 Therefore, the error is not harmless, and the ALJ’s decision is not supported by
7 substantial evidence.

- 8
9 **2. Did the administrative law judge (ALJ) properly consider Plaintiff’s**
10 **substance abuse in finding him not disabled; (3) Did the ALJ properly**
11 **find that Plaintiff’s allegations regarding his symptoms and limitations**
12 **were not entirely credible, especially when consideration is give to the**
13 **new evidence; and (4) Did any of the alleged errors result in a failure**
14 **by the ALJ to determine properly plaintiff’s residual functional**
15 **capacity and formulate an accurate vocational hypothetical question?**

16 Because the Court already has concluded that the ALJ failed to evaluate properly
17 the medical evidence, the remaining contentions by plaintiff do not need to be addressed
18 herein, *see supra*, section 1. The medical evidence will need to be evaluated anew,
19 including the evidence of plaintiff’s substance abuse. In addition, as a determination of a
20 claimant’s credibility relies in part on the assessment of the medical evidence, plaintiff’s
21 credibility necessarily must be evaluated anew. *See* 20 C.F.R. § 404.1529(c). Similarly,
22 plaintiff’s RFC and the remainder of the sequential disability evaluation process must be
23 evaluated anew, as necessary.

24 //

1 **5. Whether this matter should be reversed and remanded for further**
2 **consideration or for an immediate payment of benefits.**

3 Generally when the Social Security Administration does not determine a
4 claimant's application properly, "the proper course, except in rare circumstances, is to
5 remand to the agency for additional investigation or explanation." *Benecke v. Barnhart*,
6 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit has put
7 forth a "test for determining when [improperly rejected] evidence should be credited and
8 an immediate award of benefits directed." *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th
9 Cir. 2000) (quoting *Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). It is
10 appropriate when:

11 (1) the ALJ has failed to provide legally sufficient reasons for rejecting such
12 evidence, (2) there are no outstanding issues that must be resolved before a
13 determination of disability can be made, and (3) it is clear from the record that the
14 ALJ would be required to find the claimant disabled were such evidence credited.

14 *Harman, supra*, 211 F.3d at 1178 (quoting *Smolen, supra*, 80 F.3d at 1292).

15 Here, outstanding issues must be resolved. *See Smolen, supra*, 80 F.3d at 1292.
16 Although the ALJ failed to evaluate the medical evidence properly, the medical evidence
17 nevertheless contains differing opinions regarding plaintiff's ability to perform work
18 activity. In addition, new evidence is in the record that the ALJ did not have the
19 opportunity to evaluate. Furthermore, the decision whether to remand a case for
20 additional evidence or simply to award benefits is within the discretion of the court.
21 *Swenson v. Sullivan*, 876 F.2d 683, 689 (9th Cir. 1989) (citing *Varney v. Secretary of*
22 *HHS*, 859 F.2d 1396, 1399 (9th Cir. 1988)).
23
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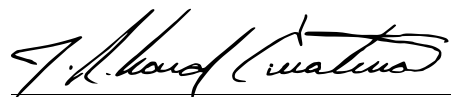
1 The ALJ is responsible for determining credibility and resolving ambiguities and
2 conflicts in the medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)
3 (*citing Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995)). If the medical
4 evidence in the record is not conclusive, sole responsibility for resolving conflicting
5 testimony and questions of credibility lies with the ALJ. *Sample v. Schweiker*, 694 F.2d
6 639, 642 (9th Cir. 1999) (*quoting Waters v. Gardner*, 452 F.2d 855, 858 n.7 (9th Cir.
7 1971) (*citing Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980))).

8 CONCLUSION

9
10 Based on the stated reasons and the relevant record, the undersigned recommends
11 that this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42
12 U.S.C. § 405(g) to the Commissioner for further consideration. **JUDGMENT** should be
13 for **PLAINTIFF** and the case should be closed.

14 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
15 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R.
16 Civ. P. 6. Failure to file objections will result in a waiver of those objections for
17 purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C).
18 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the
19 matter for consideration on February 7, 2014, as noted in the caption.

20 Dated this 14th day of January, 2014.

21
22 

23 J. Richard Creatura
24 United States Magistrate Judge